No. 85-2153

Supreme Court, U.S.
FILED
JUN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,
vs.
BOSTON & MAINE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the First Circuit

HAROLD A. ROSS,
Counsel of Record
JOSEPH E. PREKOP
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313
Counsel for Petitioner Brotherhood of Locomotive Engineers

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

52 pp

QUESTIONS PRESENTED

1. Does the exemption granted a railroad by the Interstate Commerce Commission under 49 U.S.C. §10505 in a lease transaction automatically relieve the carrier from its bargaining obligations under the Railway Labor Act (45 U.S.C. §§151 *et seq.*) and also its obligations to preserve the rules, working conditions and collective bargaining rights of its employees as provided under 49 U.S.C. §11347, thereby depriving its employees of any voice in determining which persons may operate the trains over the leased trackage?

2. Did the court of appeals err in concluding that an action to enjoin what it found to be a clear violation of the Railway Labor Act through unilateral changes in major working conditions by the rail carrier involved in a transaction exempted by the Interstate Commerce Commission is a collateral attack on the Commission's order and, therefore, not within the jurisdiction of the courts?

3. Whether the carrier, by altering its historical practices through a unilateral change in one of two locations clearly specified in an agreement not affected by the Commission's order, violates Sections 2, Seventh and 6 of the Railway Labor Act (45 U.S.C. §§152, Seventh and 156) by refusing to comply with the labor contract on the basis that the employees no longer work between the points specified in the agreement?

PARTIES TO THE PROCEEDINGS

The Brotherhood of Locomotive Engineers is the bargaining representative for the craft of locomotive engineers employed by the respondent, Boston & Maine Corporation, and was the plaintiff-appellant before the court of appeals below. Boston & Maine, a wholly owned subsidiary of Guilford Transportation Company, was the defendant-appellee in the court below.

TABLE OF CONTENTS

Questions Presented I
Parties to the Proceedings II
Table of Authorities IV
Opinions Below 1
Jurisdiction 2
Statutes Involved 2
Statement of the Case 2
Facts 5
Reasons for Granting the Writ 8
Conclusion 20

Appendix:

Appendix A Opinion of the Court of Appeals (April 9, 1986) 1a
Appendix B Judgment of the Court of Appeals (April 9, 1986) 15a
Appendix C Opinion of the District Court (October 4, 1985) 16a
Appendix D Order of Dismissal Entered by District Court (October 4, 1985) 20a
Appendix E Statutes Involved 21a

TABLE OF AUTHORITIES

Cases

Air Cargo, Inc. v. Local Union 851, International Brotherhood of Teamsters, 733 F.2d 241 (2d Cir. 1984) 18

Brotherhood of Locomotive Engineers v. Chicago & North Western Ry., 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) 11

Brotherhood of Locomotive Engineers v. Interstate Commerce Commission, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3630 (U.S., March 25, 1986) (Nos. 85-792 and 85-793) 8, 9, 10, 11

Detroit & Toledo Shore Line R. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 396 U.S. 142 (1969) 8, 11, 12, 16, 18, 19

Mendocino Coast Railway, Inc. - Lease and Operations - California Western Railroad, 354 I.C.C. 732 (1978), *as modified in* 360 I.C.C. 653 (1980) 4, 6, 14

Missouri Pacific R. Co. v. United Transportation Union, 782 F.2d 107 (8th Cir. 1986), *petition for cert. pending*, 54 U.S.L.W. 3463 (U.S., Jan. 14, 1986) (No. 85-1054) 8, 10

New York Dock Ry. - Control - Brooklyn Eastern District Terminal (New York Dock II), 360 I.C.C. 60 (1979) 14

Norfolk & Western Ry Co. - Trackage Rights - BN, 354 I.C.C. 605 (1979) 14

Order of Railroad Telegraphers v. Chicago & North Western Ry., 362 U.S. 330 (1960) 11, 12

Oregon Short Line R. Co. - Abandonment - Goshen (Oregon III), 360 I.C.C. 91 (1979) 14

Southern Ry. - Control - Central of Georgia Ry., 331 I.C.C. 151 (1967) 15

Texas and New Orleans R. Co. v. Brotherhood of Railroad Trainmen, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), *reh. denied*, 375 U.S. 871 (1963) 11, 15, 17

Statutes

Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*

49 U.S.C. §10505 ..... 2, 4, 5, 12, 16
49 U.S.C. §10505(a) 13
49 U.S.C. §10505(g) 13, 15
49 U.S.C. §11341 2
49 U.S.C. §11341(a) 4, 5, 9, 10
49 U.S.C. §11343 10
49 U.S.C. §11344 10
49 U.S.C. §11347 ..... 2, 8, 9, 12, 13, 15

Railway Labor Act, 45 U.S.C. §§151 *et seq.* 1

45 U.S.C. §152, First 2
45 U.S.C. §152, Seventh 2, 16, 17
45 U.S.C. §156 ..... 2, 4, 8, 11, 16, 17, 18

Rail Passenger Service Act, 45 U.S.C. §§405, 565 13

Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 1439), §402(a) 13

No.

In the Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

BOSTON & MAINE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the First Circuit

The petitioner, Brotherhood of Locomotive Engineers (BLE), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on April 9, 1986.

OPINIONS BELOW

The opinion of the court of appeals, which is officially reported at 788 F.2d 794, and the opinion of the district court for the District of Massachusetts, not yet reported, appear in the Appendix at 1a-14a and 16a-19a, respectively.[1]

1. References to "JA" are to the Joint Appendix in the court of appeals, and those with the suffix "a" are to the appendix attached to the petition.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1986. Petitioner BLE filed a motion for stay of mandate on April 28, 1986, which was denied on May 2, 1986. This petition for writ of certiorari has been timely filed under 28 U.S.C. §2101(c) and Rule 20.2 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this proceeding are the Interstate Commerce Act (49 U.S.C. §§10505, 11341 and 11347) and the Railway Labor Act (45 U.S.C. §§152, First and Seventh and 156). The pertinent portions of these statutes are set forth in the Appendix at 21a-25a.

STATEMENT OF THE CASE

Proceedings Below

This case arises out of a dispute resulting from unilateral actions taken by the Boston & Maine Corporation (B&M), a carrier by rail, subsequent to its lease to the New England Southern Railroad (NES) of certain of B&M's New Hampshire lines running from Manchester, New Hampshire to Penacook, New Hampshire, a distance of 27 miles (2a). BLE is the authorized collective bargaining representative for B&M's locomotive engineers.

On July 18, 1985, BLE filed this action in the federal district court for the District of Massachusetts and prayed for declaratory and injunctive relief based upon violations

of the Railway Labor Act (RLA) caused by unilateral changes in the rates of pay, rules and working conditions of B&M's locomotive engineers from, first, B&M's abrogation of a 1968 collective bargaining agreement governing the operation of unit coal trains, and, second, its subcontracting of engineers' work on B&M's New Hampshire lines to employees of another rail carrier.

On October 4, 1985, the district court dismissed BLE's complaint for want of subject matter jurisdiction, although it did not consider the second count which challenged B&M's abolishment of the Concord yard switching assignment and elimination of assignments between East Deerfield, Massachusetts and Concord, New Hampshire, commonly referred to as "EDCO/COED." As to the first count of the complaint—unilateral abrogation of the 1968 unit coal train agreement—the district court ignored the allegations of violations of the RLA and instead focused narrowly on whether that agreement applied under the conditions created by the changes B&M unilaterally instituted in the summer of 1985 on those assignments (17a). B&M argued that since the introductory words of the agreement referred to "the operation of special Unit Coal Trains between Mechanicville, New York and Concord, New Hampshire," and the engineers could no longer work that specific route by reason of the alterations of assignments it had made, "an arguable basis [existed] for defendant's claim in the language of the agreement." Accepting this reasoning, the trial court held that the complaint raised a "minor dispute" within the exclusive jurisdiction of the National Railroad Adjustment Board (NRAB) (19a).

Affirming, the court of appeals adopted a different approach. As to the second count, which had been ignored

by the trial court, the court below held that B&M's unilateral changes in the Concord switching assignment and the EDCO/COED assignments violated the RLA and created a "major dispute" as to which B&M was required to serve a notice upon BLE pursuant to Section 6 of the RLA, 45 U.S.C. §156, and ultimately to exhaust the negotiation and mediation procedures of the Act. In sum, according to the court of appeals, B&M's machinations "constitute a unilateral action by the railroad not based on the existing agreement or past practice [,] thus constituting a question as to the formation of a new agreement." (8a).

Although holding that B&M had violated the RLA, the court of appeals found that the district court lacked jurisdiction. The court below reached this conclusion as to count two on the basis that the Interstate Commerce Commission in a decision dated April 26, 1985 had granted a joint petition filed by B&M and NES for exemption of the lease transaction pursuant to 49 U.S.C. §10505, 354 I.C.C. 732 (1978), and the authority granted by the Commission automatically exempted B&M from its obligations under the RLA. According to the court of appeals, with B&M having been exempted from the RLA by reason of 49 U.S.C. §11341(a), BLE's complaint constituted a collateral attack upon the ICC's order which the district court was without jurisdiction to entertain (14a).

As to the first count concerning the unit coal train assignment, the court of appeals totally disregarded its analysis on count two relative to a major dispute having arisen from the unilateral changes in the switching and EDCO/COED assignments made by B&M. Though tacitly finding that these actions of B&M were not covered by the ICC authority, the Court below approached the subject

in a manner similar to the rationale followed by the district court, holding that abrogation of the unit coal train agreement raised a minor dispute over which the courts lacked jurisdiction (7a).

FACTS

The factual situation involved in this case clearly raises several important issues relating to the bargaining obligations of rail carriers under the RLA and the resulting impact upon tranquil labor relations in the rail transportation industry. The first, already before this court and the subject of much pending litigation, involves the interaction of the Interstate Commerce Act and the RLA in Commission approved transactions. Here, the ICC's exemption of a lease transaction under 49 U.S.C. §10505 was found by the court of appeals to automatically exempt B&M under 49 U.S.C. §11341(a) from its bargaining obligations under the RLA, so that BLE's action to enjoin unilateral action forbidden by the RLA fell outside the jurisdiction of the federal courts. Under this view, railroad employees have no voice in matters vital to their livelihood and workday activities. The second issue involved also raises the specter of a disruption in the peaceful flow of interstate commerce, for a carrier may completely escape its contractual obligations, under the view expressed below, by simply taking the position that a labor agreement is no longer applicable because the employees no longer fall within its terms due to the incipient unilateral changes made by the carrier. Obviously, rail employees would become disgruntled in being deprived of their side of a bargain through sleight of hand manipulations by carriers, who desire to circumvent the purposely drawn out major dispute procedures of the RLA.

As previously noted, this controversy arises from actions taken by B&M following its lease to NES of 27 miles of its line of rail in New Hampshire. In January of 1985, B&M and NES filed a joint petition with the ICC for exemption of the lease transaction (17a). In its April 26, 1985 decision, which by its terms became effective on June 17, 1985, the ICC granted the requested exemption, subject to the employee protective conditions specified in *Mendocino Coast Railway, Inc. - Lease and Operations - California Western Railroad*, 354 I.C.C. 732 (1978), *as modified in* 360 I.C.C. 653 (1980) (2a).

Subsequent to the ICC decision, B&M made several unilateral changes in rates of pay, rules and working conditions for locomotive engineers. First, B&M unilaterally abolished a switching assignment at Concord, New Hampshire, and informed BLE that NES employees would thereafter perform the switching (3a). Second, B&M unilaterally shortened an assignment known as "EDCO/COED" from East Deerfield, Massachusetts to Concord so that B&M employees represented by BLE would work only as far as Manchester, New Hampshire, rather than Concord, and would therefore suffer a corresponding reduction in pay (3a). Third, as described in the following paragraph, B&M unilaterally abrogated an agreement dated January 11, 1968, which provided it with certain efficiencies in the operation of unit coal trains in exchange for enhanced rates of pay and other favorable conditions for locomotive engineers (6a and JA at 24, 25 and 67).

B&M's abrogation of the unit coal train agreement involved a three step process. Initially, B&M unilaterally abolished the regularly scheduled assignments on the unit coal trains which previously ran 204 miles from Mechanicville, New York to Bow, New Hampshire. At Bow, the

coal cars would be detached at the Public Service of New Hampshire electric generating plant with the engine and caboose then proceeding five miles northward to Concord where the crew would be rested (JA at 15 and 18). B&M then replaced the regularly scheduled assignments with new assignments through its spare board at Mechanicville, New York (JA at 20). These assignments were identical to the prior scheduled assignments in that they still ran over the 204 mile distance from Mechanicville, New York to Bow. However, now instead of proceeding northward five miles to Concord after the delivery of the coal cars at Bow, the engine and caboose were taken southward one mile to the "Perini" track where the crew was then driven approximately ten or eleven miles to Manchester, New Hampshire for rest (JA 18-20). As the final step in its abrogation of the unit coal train agreement, B&M informed BLE that it would no longer comply with the agreement (JA at 19). In reaching this position, B&M relied on the introductory words of reference in the agreement which referred to "the operation of Special Unit Coal Trains between Mechanicville, New York and Concord, New Hampshire." (6a). Since locomotive engineers no longer proceeded to Concord after delivering the coal cars at Bow due to the unilateral operational changes B&M had made, B&M contended that it had no obligation to adhere to the terms of the unit coal train agreement (*Id.*). The net result of B&M's action was that through its own unilateral acts, B&M escaped its obligations under the unit coal train agreement, yet still accomplished the delivery of coal cars from Mechanicville to Bow in the same manner as before, while paying its locomotive engineers only half of what they were previously paid (JA at 72).

After conferences between B&M and BLE failed to resolve the dispute, BLE filed suit alleging that B&M

violated the RLA by unilaterally instituting the changes in job assignments previously discussed and by abrogating the January 11, 1968 unit coal train agreement without serving notice on BLE pursuant to Section 6 of the RLA, 45 U.S.C. §156, and negotiating under the terms of the RLA.

REASONS FOR GRANTING THE WRIT

The decision below raises in a novel manner the question of whether a self-executing exemption from the employee rights under the RLA, which seemingly are protected by 49 U.S.C. §11347, adheres to the involved railroads in transactions approved (or exempted) by the ICC, which issue is related to two cases now pending before this Court. *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission* [hereafter *"BLE v. ICC"*], 761 F.2d 714 (D.C. Cir. 1985), *cert. granted,* 54 *U.S.L.W.* 3630 (U.S., March 25, 1986) (Nos. 85-792 and 85-793); *Missouri Pacific R. Co. v. United Transportation Union,* 782 F.2d 107 (8th Cir. 1986), *petition for cert. pending,* 54 *U.S.L.W.* 3463 (U.S., Jan. 14, 1986) (No. 85-1054). It also misapplies the doctrine set forth by this Court in *Detroit & Toledo Shore Line R. Co. v. Brotherhood of Locomotive Firemen & Enginemen* [hereafter *"Shore Line"*], 396 U.S. 142 (1969), and other cases, which require a rail carrier to serve the notice required by Section 6 of the RLA, 45 U.S.C. §156, and to exhaust the RLA's negotiation and mediation procedures before it alters the rates of pay, rules and working conditions of its employees. Moreover, the rationale of the decision creates confusion as to applicability of the RLA procedures to similar disputes, one of which was considered "major" and the other a "minor" one, and also uncer-

tainty as to the extent to which an ICC order may proscribe the courts from exercising jurisdiction to enforce the provisions of the RLA in a major dispute. The issues presented are of major importance and require a careful balancing of the public interest in the efficient and competitive operation of rail carriers against its paramount interest in the protection of interstate commerce from disruption resulting from industrial discord and in preventing any interference with the statutory means provided to eliminate that discord. The importance of the issues is magnified by implications in the decision below that rail employees no longer have a voice in their employment relationships and that any violation of the vestige of rights that they may retain in an ICC approved transaction cannot be protected by the federal courts. For these reasons, review by this Court is warranted.

1. The purported self-executing exemption of employee rights under the RLA provided by 49 U.S.C. §11347 in transactions approved or exempted by the ICC is related to two cases now pending before this Court.

In the first case, the Court of Appeals for the District of Columbia Circuit vacated orders of the ICC which claimed to waive the railroads' obligation under the RLA to negotiate over crew selection in a trackage rights transaction approved by the ICC. *BLE v. ICC,* 761 F.2d 714 (D.C. Cir. 1985). The court of appeals held that the ICC order approving the transaction did not exempt the affected rail carriers in a self-executing fashion from their obligations under the RLA, because the exemption authority provided the ICC under 49 U.S.C. §11341(a) is limited to those laws "as necessary to let that person carry out the transaction. . ." and, therefore, 49 U.S.C. §11341(a) requires the ICC to supply a reasoned basis

that the exemption is necessary to the completion of the transaction. 761 F.2d at 723-25.

Earlier this year, this Court granted certiorari in *BLE v. ICC* on the question of "[w]hether the Interstate Commerce Commission, when approving a transaction pursuant to 49 U.S.C. §§11343 and 11344, is required to make specific findings of necessity pursuant to 49 U.S.C. §11341 (a) in order to exempt the carriers participating in the approved transaction from the requirements of the Railway Labor Act?" 54 U.S.L.W. 3630 (U.S., March 25, 1986) (Nos. 85-792 and 85-793). Cross-petitions for certiorari are pending. (Nos. 85-983 and 85-997).

Notwithstanding the decision of the court of appeals in *BLE v. ICC, supra,* that the ICC orders *did not* exempt the affected rail carriers from their obligations under the RLA, the Court of Appeals for the Eighth Circuit reached the opposite conclusion in a case arising out of the same transaction by holding that the same ICC orders *did* exempt the affected carriers from their bargaining obligations under the RLA. *Missouri Pacific R. v. United Transportation Union,* 782 F.2d 107 (8th Cir. 1986), *petition for cert. pending,* 54 *U.S.L.W.* 3463 (U.S., Jan. 14, 1986) (No. 85-1054). In reaching this conclusion, the court interpreted the ICC orders as designating which carrier's employees will operate the train and, therefore, held that the carriers were immune from bargaining over crew selection. A petition for certiorari is now pending. (*Id.*).

In the present case, the Court of Appeals for the First Circuit accepted the Eighth Circuit reasoning and rejected the reasoning of the District of Columbia Circuit. This direct conflict between the circuit courts has led to enormous confusion in the railroad industry and is

obviously in need of clarification from the Court. *Cf. alsc Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Texas and New Orleans R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), *reh. denied*, 375 U.S. 871 (1963), discussed *infra* at 17. Since this Court has granted certiorari on this issue in *BLE v. ICC, supra* (Nos. 85-792 and 85-793), certiorari should similarly be granted in this case. In fact, this case is an appropriate vehicle to treat in a very practical way with the question of the extent, if any, of railroad employees' continuing rights under existing labor contracts following a financial transaction approved or exempted by the ICC.

2. The decision of the First Circuit in this case that as a result of the ICC order the district court lacked jurisdiction to remedy the violations of the RLA committed by B&M also conflicts with decisions of this Court. It is well held that a railroad may not unilaterally abrogate or alter rules and working conditions of its employees. *Detroit & Toledo Shore Line R. Co. v. Brotherhood of Locomotive Firemen & Enginemen*, 396 U.S. 142 (1969). In order to change the labor contract, the railroad must serve the notice required by Section 6 of the RLA, 45 U.S.C. §156, and exhaust the RLA's negotiation and mediation procedures. The entire scheme of the Act is "to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." (*Id.* at 148).

In *Order of Railroad Telegraphers v. Chicago & North Western R. Co.*, 362 U.S. 330 (1960), this Court rejected the concept that the Interstate Commerce Act abrogates the right of the carrier's employees to negotiate on job security and stability:

> It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs. (*Id.* at 339-340).

In response to the carrier's argument that negotiations and possible continued operation of service and lines would be wasteful and contrary to the policy expressed in the Interstate Commerce Act to foster an efficient national railroad system, the Court said that "Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service." (*Id.* at 342).

The decision of the court below conflicts with *Shore Line, supra,* and *Order of Railroad Telegraphers v. Chicago & North Western R. Co., supra,* because it impermissibly and seriously intrudes on an area regulated by the RLA, and undermines the policy furthering collective bargaining. The rationale exempting rail carriers from the procedures of that Act would improperly allow applications to the ICC to replace the congressionally prescribed policy seeking industrial stability through the exercise of a voice by workmen in their industrial life.

3. The decision of the court below also disregards the legislative history of 45 U.S.C. §§10505 and 11347. Under the former section, the ICC may exempt a carrier from the

normal requirements of ICC approval if the ICC finds that such approval is not necessary to carry out national transportation policy and either the transaction is of limited scope or the normal ICC approval is not needed to protect shippers from the abuse of market power. 49 U.S.C. §10505(a). However, the ICC's authority to exempt carriers under that section is limited by subsection (g) which provides that the Commission may not exercise its authority "to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle." 49 U.S.C. §10505(g). Thus, subsection (g) incorporates the labor protective benefits ordinarily required in ICC approved transactions under 49 U.S.C. §11347.

Section 11347 mandates that the Commission require "the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, *and the terms established under section 405 of the Rail Passenger Service Act* (45 U.S.C. §565."[2] (Emphasis supplied). By reference to 45 U.S.C. §565, Congress incorporated the following substantive requirements for employee protection contained in Section 565(b):

> Such protective arrangements shall include, without being limited to, such provisions as may be neces-

---

2. The words providing that "the arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 565 of title 45" were added to former 49 U.S.C. §5(2)(f) by Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, 90 Stat. 65). With certain minor modifications, this section was readopted by Congress on October 17, 1978, in the revised and recodified Interstate Commerce Act as 49 U.S.C. §11347 (Pub. L. 95-473, 92 Stat. 1439). In 1984, the words "section 405 of the Rail Passenger Service Act (45 U.S.C. §565)" were substituted for the former words "section 565 of title 45." (Pub. L. 98-216).

> sary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights. . . .

In accordance with the foregoing provisions, the ICC has fashioned a set of employee protections in lease transactions which includes a requirement that the railroads preserve the RLA rights of the affected employees and that those affected employees be given a voice in devising the procedure used to select the forces to perform train operations on the leased trackage. *Mendocino Coast Ry., Inc. - Lease and Operate,* 354 I.C.C. 732 (1978), *as modified in* 360 I.C.C. 653 (1980). That language was adopted as Article I, Section 2 of the *Mendocino Coast* conditions prescribed by the Commission in this case (Finance Docket No. 30618), which reads:

> The rates of pay, *rules, working conditions and all collective bargaining and other rights, privileges and benefits* . . . of railroads' employees *under* applicable laws and/or *existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements* or applicable statutes. (Emphasis supplied).[3]

---

3. The first *Mendocino Coast* case, 354 I.C.C. 732 (1978), incorporated by reference for lease transactions the conditions applicable to trackage rights cases as set forth in *Norfolk & Western Ry. Co. - Trackage Rights - BN*, 354 I.C.C. 605 (1978). The second *Mendocino Coast* case, 360 I.C.C. 653 (1980), amended both *Mendocino Coast* and *Norfolk & Western* conditions in light of the ICC's decisions in *New York Dock Ry. - Control - Brooklyn Eastern District Terminal* (*New York Dock II*), 360 I.C.C. 60 (1979) and *Oregon Short Line R. Co. - Abandonment - Goshen* (*Oregon III*), 360 I.C.C. 91 (1979). The portion of the *Mendocino Coast* conditions quoted in the text *supra* comes from Article I, Section 2 of the original *Norfolk & Western* conditions which was unaffected by the subsequent amendment to the *Mendocino Coast* conditions.

As the unambiguous language of that provision commands, railroads involved in a transaction must implement it in a manner that will preserve the collective bargaining rights of employees, including their existing rates of pay, rules and working conditions, among which would be crew assignments and rights to man positions. Clearly then, employees' rights under the RLA are not exempted by, but rather are expressly retained by ICC orders in accordance with the requirements of 49 U.S.C. §§10505(g) and 11347 and the labor protective benefits imposed pursuant to those statutory requirements. *See Texas & New Orleans R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962) (rejecting the view that labor protective benefits exempt carriers from their RLA obligations and holding that "to carry an approved transaction into effect, the parties must rely upon agreements voluntarily entered into and enforced under local law."). *See also Southern Ry. - Control - Central of Georgia Ry.*, 331 I.C.C. 151 (1967).

4. Further, the decision of the court below carries with it far-reaching implications affecting national railway labor policy. Collective bargaining agreements in the railroad industry are entered into on the basis that they are subject to the interminably long and drawn out procedures of the Railway Labor Act before they may be changed. Moreover, as a result of the protections provided employees affected by a transaction in Section 11347 of the Interstate Commerce Act, the employees and their representatives anticipate that the rules, working conditions and other collective bargaining rights are preserved notwithstading the Commission's approval of a financial transaction between railroads. In short, employees historically have had a voice in crew assignments and the manning of po-

sitions. However, under the reasoning of the court below, issues that go to the very heart of the collective bargaining relationship and the terms of those agreements may be dispensed with merely by the entry of an order by the Commission even though the Commission never discussed or even mentioned the issue of crew selection or the possible exemption of employees' rights under the Railway Labor Act.

In sum, the decision of the court of appeals that the ICC's grant of an exemption under 49 U.S.C. §10505 further automatically exempts the railroad from the RLA procedures impermissibly and seriously intrudes on an area regulated by federal labor law and undermines important policies embodied therein. Acccordingly, a great deal of uncertainty faces employees in the railroad industry, and only this Court through the exercise of its general supervisory powers can at this time bring a measure of stability to labor relations in the railroad industry.

5. In ruling that a major dispute in violation of Sections 2, Seventh and 6 of the RLA, 45 U.S.C. §152, Seventh and 156, did not arise when B&M changed the job assignment locations set forth in the 1968 agreement and then refused to comply with the terms of the agreement on the ground that the employees no longer were within its coverage, the decision of the court of appeals is in direct conflict with this Court's decision in *Shore Line, supra.* In that case, this Court held that a carrier creates a major dispute in violation of Section 2, Seventh and 6 of the RLA when it unilaterally changes a job assignment reporting point without following the notice, negotiation and mediation procedures specified in the Act for resolution of major disputes. In this case, however, contrary to *Shore Line,* the court of appeals ruled that the carrier did

not create a major dispute when it made unilateral changes in the unit coal train job assignment.

Not only does the decision below conflict with the decision of the federal court of appeals for the Fifth Circuit, in *Texas & New Orleans R. Co. v. Brotherhood of Railroad Trainmen, supra*, but it internally conflicts with its own rationale. With respect to the Concord yard switching assignment and the "EDCO/COED" assignments, the court of appeals ruled that B&M created a major dispute in violation of Sections 2, Seventh and 6 of the RLA, 45 U.S.C. §152, Seventh and 156, when it made unilateral changes in those changes in job assignments (8a-9a). However, in the coal train aspect of the decision, the court held that since those job assignments are listed in an agreement as being between two particular points, B&M did *not* create a major dispute when it unilaterally changed one of those points (7a). The obvious irony in this decision is threefold. First, it holds that the carrier's unilateral action is unlawful where no written agreement expressly covers the job assignments, but is not unlawful where the job assignments are codified in an express written agreement. Second, it holds that a carrier may escape its contractual obligations by virtue of its own unlawful unilateral action, even though the agreement expressly specifies that it "will remain in effect until changed in accordance with the provisions of the Railway Labor Act, as amended." (JA at 25). Third, it results in the anomalous situation whereby B&M still obtains all the benefits of the delivery of the unit coal cars along the same 204 mile route from Mechanicville, New York to Bow, New Hampshire precisely as before, but now pays its locomotive engineers only half of what they earned when the 1968 unit coal train agreement was in effect (JA at 72).

The decision of the court of appeals unquestionably has nationwide significance because many agreements in the railroad industry are written in a similar fashion as the agreement at issue in this case. In the event carriers are able to escape their obligations so easily, the national interests in the stability of labor relations and the continuance of interstate commerce will undoubtedly be threatened.

6. In refusing to maintain the status quo provided for in Section 6 of the RLA, 45 U.S.C. §156, the decision below also conflicts with the Court's decision in *Shore Line* that the status quo includes not only those working conditions expressly embodied in collective bargaining agreements, but also "those actual objective working conditions out of which the dispute arose," including those actions "apart from the agreement, [which] had occurred for a sufficient period of time with the knowledge and acquiescence of the [parties] to become in reality a part of the actual working conditions." 396 U.S. at 154. Under this rationale, B&M's long standing and consistent adherence and application of the agreement in circumstances identical to its present operations became in reality a part of the actual working conditions, which B&M was prohibited from unilaterally changing. *See also Air Cargo, Inc. v. Local Union 851, International Brotherhood of Teamsters*, 733 F.2d 241, 246 (2d Cir. 1984) ("If the parties have agreed to practices different than those specified in the collective bargaining agreement, or if actual behavior has been acquiesced to by the other party, see *Shore Line*, 396 U.S. at 154, the actual practices may constitute the status quo").

B&M admitted in the proceedings below that on prior occasions when locomotive engineers delivered the coal

cars from Mechanicville to Bow, B&M consistently complied with the unit coal train agreement even on those instances when the engine and caboose did not proceed over the five mile distance from Bow to Concord after the delivery of the coal cars at Bow (JA at 111-112). Accordingly, notwithstanding the introductory words of reference in the agreement, B&M's consistent application of the unit coal train agreement to the trip from Mechanicville to Bow became an established working condition for which B&M was prohibited from unilaterally changing.

However, the basis used by the court of appeals for declining to find a major dispute is that BLE's arguments "are best left to the [NRAB]" based upon B&M's contention that the instances relied upon by BLE "averaged fewer than one per year and were largely, if not entirely, [confined] to emergencies such as train blockages." (6a, fn. 6). However, B&M's arguments do not provide an excuse for its refusal to maintain the status quo because, regardless of the reasons, the terms of the unit coal train agreement have been consistently applied over the years even when the runs did not end in Concord. It is certainly ironic that the unit coal train agreement is held to be applicable in circumstances supposedly outside of B&M's control (track blockages and Hours of Service violations) and yet inapplicable to circumstances fully within B&M's control (B&M's own change in route assignment). To avoid this absurd result, and to resolve the conflict with *Shore Line*, this Court should exercise its supervisory powers on this issue.

CONCLUSION

The decision below is in direct conflict with decisions of this Court and impermissibly permits a rail carrier to circumvent its obligations under the Railway Labor Act, thereby undermining the policy of promoting collective bargaining. It also raises questions as to the proper balance of interests under the Interstate Commerce and Railway Labor Acts, and the judicial role in enforcing the commands of the Railway Labor Act in situations involving financial transactions approved or exempted by the Interstate Commerce Commission. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

HAROLD A. ROSS,
Counsel of Record
JOSEPH E. PREKOP
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313
Counsel for Petitioner Brotherhood of Locomotive Engineers

APPENDIX A

Opinion of the Court of Appeals

(Filed April 9, 1986)

No. 85-1852

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff-Appellant,

v.

BOSTON & MAINE CORPORATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ROBERT E. KEETON, *U.S. District Judge*]

Before
COFFIN and ALDRICH, *Circuit Judges,*
PETTINE, *Senior District Judge*.*

Harold A. Ross, with whom *Joseph E. Prekop, Ross & Kraushaar Co., L.P.A., Donald J. Siegel, Segal, Roitman & Coleman,* were on brief for appellant.

Stephen M. Olson, David J. Strasser, James E. Howard, Kirkpatrick & Lockhart, were on brief for appellee.

COFFIN, *Circuit Judge.* The Brotherhood of Locomotive Engineers (Brotherhood) filed suit in federal court in the District of Massachusetts seeking declaratory and

---

*Of the District of Rhode Island, sitting by designation.

injunctive relief for alleged violations of the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* (1982), by the Boston & Maine Corporation (B&M). The district court dismissed the case for want of subject matter jurisdiction, ruling that Brotherhood did not raise a "major" dispute under the RLA. Brotherhood appeals that decision and we affirm.

I.

Brotherhood represents employees who have been affected by a change in the operations of B&M in New Hampshire. B&M leased the New Hampshire Lines, a portion of its track, to another railroad, New England Southern Railroad (NES). The New Hampshire Lines run from Manchester, New Hampshire, to Penacook, New Hampshire, spanning twenty-seven miles.

B&M and NES filed a joint petition pursuant to the Interstate Commerce Act (ICA), 49 U.S.C. § 10505, with the Interstate Commerce Commission (ICC) for exemption of the lease transaction. The ICC granted the requested exemption, subject to the employee protective conditions specified in *Mendocino Coast Railway, Inc. - Lease and Operate - California Western Railroad,* 354 I.C.C. 732 (1978), as modified at 360 I.C.C. 653 (1980).

B&M informed Brotherhood that it would make several operational changes because positions on the leased track would now be serviced by NES employees. First, the unit coal trains, which had run from Mechanicville, New York to Concord, New Hampshire would now stop in Bow, New Hampshire, rather than Concord.[1] Second,

---

1. As a result, B&M indicated that locomotive engineers operating the unit coal trains would no longer work under the rates of pay, rules, and working conditions as specified in a 1968 collective bargaining agreement. This change affected two employees.

the length of the East Deerfield, Massachusetts to Concord route (EDCO/COED) was also shortened; Brotherhood members would work on the lines only as far as Manchester, New Hampshire, rather than Concord.[2] Third, B&M abolished the switching assignment at Concord, affecting one employee.

Pursuant to the RLA, Brotherhood served notice on B&M, proposing to revise and supplement the existing collective bargaining agreement to require that all traffic on B&M-owned trackage be serviced by B&M employees, regardless of leasing arrangements. In accordance with RLA requirements, B&M met with Brotherhood to discuss the proposal, but no agreement was reached.

Brotherhood then brought this action, contending that the proposed changes in working conditions were RLA violations, which presented "major" disputes under the Act. It sought a status quo injunction from the district court, enjoining B&M from proceeding with these changes. B&M argued that the district court lacked jurisdiction over Brotherhood's claims for two independent reasons: first, because the relief sought constituted a collateral attack on the ICC order exempting the lease from regulation, and second, because the disputes were "minor" under the RLA. The district court did not address B&M's ICC argument, but agreed with B&M that the disputes were minor.

II.

We first review whether the district court was correct in finding that it had no jurisdiction because the disputes

---

2. As a result, there would be a reduction in the mileage of the EDCO/COED assignment and a corresponding reduction in pay. This change affected two employees.

were minor. The RLA provides for the resolution of two types of disputes between carriers and labor organizations: major disputes and minor disputes.[3] A major dispute relates to the formation or modification of the collective bargaining agreement, including disputes over rates of pay, rules, or working conditions. *Carbone v. Meserve*, 645 F.2d 96, 98 (1st Cir. 1981).[4] If a district court finds the existence of a major dispute, it may enjoin either party from altering the status quo during the course of the negotiated proceedings mandated by section 6 of the RLA. *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 155 (1969).

A minor dispute contemplates an existing agreement and a disagreement regarding "the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Carbone*, 645 F.2d at 96 (quoting *Elgin, J. & E. Railway v. Burley*, 325 U.S. 711, 723 (1945). Such disputes are entrusted exclusively to arbitration by the National Railroad Adjustment Board (NRAB). 45 U.S.C. § 153, First. A district court has no jurisdiction over such disputes, and thus a

---

3. The terms "major" and "minor" are not contained in the RLA, but were articulated by the United States Supreme Court to differentiate two types of disputes described in the Act, which have distinct avenues of relief. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1944)

4. When a party wishes to make changes in "agreements affecting rates of pay, rules or working conditions," it must serve a written "Section 6 Notice", which initiates a lengthy process of negotiation and mediation that the parties must follow. Pending the exhaustion of all mandated procedures, the carrier is precluded from altering the status quo and the union is prohibited from striking. 45 U.S.C. § 156. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

party may not obtain a status quo injunction. *Carbone*, 645 F.2d at 98.[5]

Our task, then, is to determine whether the disagreements in this case were unilateral attempts to change the contract (major disputes) or were merely disagreements over the meaning or coverage of the contract (minor disputes). *Airlines Stewards and Stewardesses Association v. Caribbean Atlantic Airlines*, 412 F.2d 289, 291 (1st Cir. 1969). If the railroad acted in a manner it admitted was not in conformity with the existing agreement, a major dispute would be found; the same result obtains when the railroad's claimed justification has no reasonable basis in the contract. *Southern Railway v. Brotherhood of Locomotive Fire & Engineers*, 384 F.2d 323, 327 (D.C. Cir. 1967). When, however, the "railroad asserts a defense based on the terms of the existing collective bargaining agreement, the controversy may not be termed a 'major' dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements." *Id.* In short, if the dispute is arguably a question of interpretation or application of the contract, the court must defer to the expertise of the NRAB and decline to exercise jurisdiction. *REA Express, Inc. v. Brotherhood of Railway, Airline and Steamship Clerks*, 459 F.2d 226, 231 (5th Cir. 1972).

Brotherhood contends that B&M's operational changes present "major" disputes, entitling it to a status quo injunction from the federal court. In Count I of its com-

---

5. A carrier may therefore continue to apply its interpretation of the agreement during the pendency of a minor dispute and no strikes are permitted. *See United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542 (3d Cir. 1974).

plaint, Brotherhood challenged B&M's abrogation of a 1968 collective bargaining agreement applicable to the unit coal train route from Mechanicville to Concord. Since 1968, employees assigned to this route worked under conditions and rates of pay established by the 1968 agreement, whose conditions were more favorable than those in the general collective bargaining agreement. When the NES lease became effective, the coal trains no longer ran from Mechanicville to Concord, but instead ran from Mechanicville to Bow, five miles south of Concord. B&M indicated that Brotherhood employees on that route would now work under the conditions in the general collective bargaining agreement. B&M defended this action by reference to the 1968 agreement, asserting that the agreement did not apply to the new route because it expressly covered trains operating "between Mechanicville, New York and *Concord*, New Hampshire". (emphasis added).[6]

Brotherhood argues that B&M has abrogated the 1968 collective bargaining agreement by not applying it to employees on the Mechanicville-to-Bow route. According to Brotherhood, this abrogation constitutes a unilateral change in the major conditions of employment. It further claims that B&M's contract defense, that the 1968 agreement only applies to trains between Mechanicville and Concord, is not arguably justified by the terms of that agreement. The pay and working conditions have changed but the route remains essentially the same. Unit coal

---

6. Brotherhood argues that the unit coal train had previously stopped short of Concord, yet crews had been paid according to the 1968 agreement. B&M responds that such instances averaged fewer than one per year and were due largely, if not entirely, to emergencies such as train blockages. These arguments demonstrate a dispute as to the application of the 1968 agreement and are best left to the NRAB. *See Maine Central Railroad v. United Transportation Union*, No. 86-1037, slip op. at 6 (1st Cir. 1986).

trains still travel from Mechanicville to Bow; after reaching Bow, the trains are now taken one mile south for work and the crew is taken ten miles south for rest, instead of the trains and crew being taken five miles north to Concord.

We note, as did the district court, that Brotherhood's argument that the 1968 agreement effectively has been made inoperable is not without some merit. As a result of the lease, no unit coal train employees will work on a Mechanicville to Concord route, and thus no employee will be eligible for the more favorable pay and working conditions available under the 1968 agreement.

Our task, however, is not to arbitrate this dispute, but to determine if "it is even arguable that" the railroad's action was warranted by the contract. *Carbone v. Meserve,* 645 F.2d 96, 98-99 (1st Cir. 1981). B&M has asserted a defense based on the express terms of the existing collective bargaining agreement. The defense is not so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements. *See Southern Railway,* 384 F.2d at 327. *See also REA Express, Inc.,* 459 F.2d at 231. Thus, the controversy may not be termed a major dispute.

In Count II, Brotherhood argues that a major dispute exists with regard to the EDCO/COED route and the switching assignment at Concord.[7] Brotherhood employees are no longer employed on the New Hampshire Lines portion of the EDCO/COED route; their duties are now performed by NES employees. This change has resulted in a reduction in the mileage of the EDCO/COED assign-

---

7. The district court did not discuss this count in its opinion, but it dismissed the entire complaint for want of jurisdiction.

ment for Brotherhood employees and a corresponding reduction in pay. The switcher assignment at Concord was abolished and the duties are now performed by NES employees. Brotherhood charges that these changes raise a major dispute under the RLA, because they constitute a unilateral action by the railroad not based on the existing agreement or past practice, thus constituting a question as to the formation of a new agreement. We agree.

In defending an operational change as not raising a major dispute, a carrier is not limited to the collective bargaining agreement to show the basis for its action. The Supreme Court has stated that the carrier can rely on "those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement." *Detroit & Toledo Shore Line Railroad v. United Transportation Union,* 396 U.S. 142, 153 (1969). The Supreme Court has made clear that for a past practice to be considered an "actual, objective working condition[]", it must have occurred "for a sufficient period of time with the knowledge and *acquiescence* of the employees to become in reality a part of the actual working conditions." *Id.* at 154 (emphasis supplied). Accordingly, in an opinion of this court also published today, we found a minor dispute where the carrier could identify "instances of past practice *accepted by the unions* which, arguably, could support its contention". *Maine Central Railroad v. United Transportation Union,* No. 86-1037, slip op. at 6 (1st Cir. 1986).

B&M cannot meet even this minimal burden. It concedes that its action has no basis in the agreement but correctly identifies instances of past practice that could, arguably, support its contention. Fatal to B&M's argument, however, is its admission that the instances were

not "accepted by the unions", but were contested each time. Thus, we find that B&M's operational changes as identified in Count II constituted "an attempt to acquire a set of totally new 'rights for the future', which must be processed as a major dispute before it can be effected." *Id.* at 5 (quoting *Carbone v. Meserve*, 645 F.2d 96, 98 (1st Cir. 1981)).

Our conclusion that the district court erred in finding that the dispute in Count II was minor does [sic] not the end of the matter. Appellee presents this court with an alternative basis for affirming the district court's decision. B&M argues, as it did below, that if the dispute is major, the district court lacked jurisdiction to preserve the status quo because B&M is exempted under § 11341(a) of the ICA from the requirements of the RLA with respect to major disputes. We now turn to that argument.

III.

B&M argues that the district court lacked jurisdiction to consider Brotherhood's request for relief in Count II because the claim was in essence a collateral attack on the ICC order. Judicial review of ICC orders is limited to an action brought pursuant to 28 U.S.C. §§ 2321 and 2342, and is exclusively within the jurisdiction of the courts of appeals; the district court has no jurisdiction over such an action.

In the Staggers Rail Act of 1980 (Staggers Act), which reduced governmental economic regulation of the nation's railroads, Congress broadened the ICC's authority to exempt a carrier, service, or transaction from regulation. 49 U.S.C. § 10505 (1982). *See* Note, *Fine-Tuning Deregulation: The Interstate Commerce Commission's Use*

of Its General Rail-Exemption Power, 53 Geo. Wash. L. Rev. 827, 827-28 (1985).[8] The exemption authority extends to any of the statutory provisions regulating railroads, including the RLA. The exemption provision explicitly provides that "[a] carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and *from all other law*, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." 49 U.S.C. § 11341(a) (emphasis added). Thus, the ICC has the power to approve a transaction and exempt its participants from legal obstacles that would impede its fruition. *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission*, 761 F.2d 714, 717 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3582 (U.S. March 3, 1986) (No. 85-792); *Missouri Pacific Railroad v. United Transportation Union*, 580 F. Supp. 1490, 1501 (E.D. Mo. 1984), *aff'd* 782 F.2d 107 (8th Cir. 1986).

Brotherhood argues that even if the ICC has the power to exempt a carrier from RLA regulation, it did not exercise its power in this case. We are not persuaded. The ICC considered one union's objection to exempting the lease from regulation, as well as several unions' request that, if the exemption were granted, labor protective benefits be improved. The ICC stated:

---

8. The ICC must issue an exemption if it finds first, that continued regulation is unnecessary to carry out the national transportation policy, and second, that either the transaction or service is of limited scope or that application of the statute's regulatory scheme is unnecessary to protect shippers from the railroads' abuse of market power. 49 U.S.C. § 10505(a). In the instant case, the ICC made favorable determinations on both factors described above.

"[The union][9] filed a petition requesting denial of the exemption. . . . [The union] states that B&M did not negotiate with it as to any of the terms and conditions of the proposal that relate to their collective bargaining agreements. It argues that the proposal will cause irreparable harm to the rail employees that it represents and that the labor protective conditions usually imposed in such instances will not satisfy the requirements of rail labor on the B&M properly represented by [the union]. [The union] also argues that those conditions would negate the terms and conditions of the collective bargaining agreements and are contrary to the legal seniority rights that it has achieved. Thus, the union contends, any Commission action in this matter is contrary to and, therefore, barred by [the RLA].

We are required by 49 U.S.C. 11347 to impose protective conditions for employees who are affected by this type of proposal, and we have developed appropriate conditions to provide the required level of protection. [The union] has not shown how these conditions negate the terms of the collective bargaining agreements or are contrary to seniority rights. The conditions provide the basic level of protection and do not supercede the more extensive protection that may be agreed on through collective bargaining. Finally, the provisions of [the RLA] do not contain language precluding this Commission from acting on rail matters coming within our exclusive and plenary jurisdiction."

---

9. The ICC order reveals that the United Transportation Union (UTU) opposed the exemption, and UTU, Brotherhood, and the Railway Labor Executives' Association sought the imposition of labor protective benefits.

Later in its order, the ICC states:

> "Brotherhood of Locomotive Engineers request[s] the imposition of labor protective conditions. Under 49 U.S.C. 10505(g), we may not relieve a carrier of its obligation to protect employees. In transactions involving leases and contract [sic] to operate, the Commission has determined that those employee protective conditions in *Mendocino Coast Ry., Inc. - Lease and Operate*, 354 I.C.C. 732 (1978), as modified at 360 I.C.C. 653 (1980), satisfy the statutory requirements under 49 U.S.C. 11347."

The substantive benefits provided under *Mendocino Coast* are extensive. For example, dismissed employees receive an allowance of full wages and benefits for up to six years. Employees displaced to lower paying jobs receive a displacement allowance equal to the difference between their present and future earnings. The provision of these benefits clearly anticipates that employees will be adversely affected by the transaction, and it seeks to eliminate or minimize that burden.

Procedurally, the conditions of *Mendocino Coast* require that a carrier give affected employees at least a twenty-day notice prior to any operational change. The carrier must set forth the changes, including the number of employees expected to be displaced or dismissed. The carrier or union may request negotiations in order to arrive at an implementing agreement. In contrast to the conditions imposed in various types of rail transactions except trackage rights and lease cases,[10] the conditions

---

10. The conditions imposed in those cases require the carrier to serve a ninety-day notice and require that an implementing agreement be reached between carrier and union *prior* to the implementation of the transaction. *See Oregon Short Line R. Co. - Abandonment - Goshen* (Oregon III), 360 I.C.C. 91 (1979); *New York Dock Ry. - Control - Brooklyn Eastern Dist.* (New York Dock II), 360 I.C.C. 60 (1979).

in lease cases authorize the carrier to proceed with the transaction before an implementing agreement has been reached.[11]

We also note that the exemption provision, § 11341 (a), is self-executing. *Missouri Pacific Railroad*, 580 F. Supp. at 1501 (citing *Order of Railroad Telegraphers v. Chicago and Northwestern Railway Co.*, 314 F.2d 424, 432 (8th Cir. 1963). The provision states that "a carrier . . . participating in that approved or exempted transaction *is exempt* . . . from all other law . . . as necessary to let that person carry out the transaction". 28 U.S.C. § 11341(a) (emphasis added).

On the basis of the the language of the ICC order, the imposition of *Mendocino Coast* labor protective benefits, and the self-executing nature of § 11341(a), we conclude that the ICC exempted B&M from the conditions of the RLA with respect to major disputes. An order mandating the resumption by B&M of railroad services on the New Hampshire Lines would have reversed the ICC order approving the lease to NES. Further, the imposition of status-quo reemployment would have overturned the ICC order imposing *Mendocino Coast* benefits. Thus, the relief sought by Brotherhood in Count II was, in essence, a collateral attack upon the ICC's order. *See Venne v.*

---

11. When it decided not to impose Oregon III or New York Dock II benefits and conditions in lease transactions, the ICC stated:

> "In [lease transactions] we find little justification for extending a blanket imposition of provisions requiring substantially advanced preconsummation notice and finalized preconsummation negotiations with 'interested' employees when possibly there are no substanti.. number of employees likely to be adversely affected. . . . Typically, most of these transactions are not opposed by carriers or members of the shipping public and their expeditious consummation would be in the public interest." *Mendocino Coast*, 30 I.C.C. at 663.

Michigan Central Railroad, 271 U.S. 127, 130 (1926). The district court was without jurisdiction to entertain such a claim. 28 U.S.C. § 2342. *See also Missouri Pacific Railroad*, 580 F. Supp. at 1502.

Brotherhood argues alternatively that, if the ICC did exempt the lease from RLA obligations, it exceeded its authority in doing so because it granted the exemption without providing a reasoned basis for its action. For support, Brotherhood relies on a recent ruling by a divided panel of the D.C. Circuit. *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3582 (U.S. March 3, 1986) (No. 85-792). In that case, the court held that the ICC exceeded its authority in exempting participants in a rail consolidation from the RLA without specifying any necessity to justify the exemption. The court determined that although Congress gave the ICC broad authority to immunize transactions from legal obstacles, the ICC "must supply a reasoned basis for that exercise of its statutory authority". *Id.* at 723.

The opinion is inapposite to Brotherhood's claim here, where it sought relief pursuant to the RLA in federal district court. The D.C. Circuit issued its ruling on direct review from an ICC order, its jurisdiction based on 28 U.S.C. §§ 2321 and 2342. Had Brotherhood wished to challenge the ICC order as an improper exercise of the ICC's authority, it needed to challenge the order in a suit brought directly to the court of appeals.

For the reasons discussed above, the judgment of the district court is *affirmed*.

APPENDIX B

Judgment of the Court of Appeals

(Entered April 9, 1986)

No. 85-1852

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff-Appellant,

v.

BOSTON & MAINE CORPORATION,
Defendant-Appellee.

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
FRANCIS P. SEIGLIANO
Clerk.

APPENDIX C

Opinion of District Court

(Dated October 4, 1985)

Civil Action No. 85-2882-K

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff,

v.

BOSTON & MAINE CORPORATION,
Defendant.

MEMORANDUM

Plaintiff (Brotherhood) filed this action in federal court seeking declaratory and injunctive relief for alleged violations by defendant of the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* (1982). A hearing on the request for a preliminary injunction was held on August 5, 1985. The parties were given time to submit additional evidence and memoranda following the hearing. The issue addressed at hearing and in the submissions and now before the court is whether a preliminary injunction should be entered against the defendant.

I.

Plaintiff represents a number of employees who have been affected by a recent change in the operations of defendant in New Hampshire. Since 1968 plaintiff's members assigned to coal unit trains on the route from Mechan-

icville, New York, to Concord, New Hampshire, worked under conditions and ra es of pay established by a 1968 agreement.

Effective July 14, 1985, defendant leased a portion of its track known as the "New Hampshire Lines" to another railroad, New England Southern Railroad (NES). That lease was exempted from regulation by the Interstate Commerce Commission, Finance Docket Number 30618.

Pursuant to this lease agreement, defendant made a number of changes in its operations. Defendant abolished the switching assignment at Concord which formerly had been filled by a member of the Brotherhood. Defendant also reduced the length of the East Deerfield to Concord assignment. The Brotherhood members assigned to that route would thereafter work only so far as Manchester, New Hampshire. Finally, the coal unit trains from Mechanicville would stop in Bow, New Hampshire, rather than Concord.

Because the coal unit trains no longer run from Mechanicville to Concord but from Mechanicville to Bow, defendant contends that the 1968 agreement is no longer applicable. Plaintiff brought this action to enjoin the defendants to honor the 1968 agreement.

II.

The threshold question in this case, as in any action for preliminary injunction under the RLA, is whether this court has jurisdiction. Under the RLA, federal district courts have jurisdiction only over "major" disputes. 45 U.S.C. § 156. "Minor" disputes are not properly before a district court judge and must be settled by statutorily

prescribed arbitration processes. 45 U.S.C. § 153. *Carbone v. Meserve*, 645 F.2d 96 (1st Cir. 1981); *Airline Stewards and Stewardesses Association v. Caribbean Atlantic Airlines*, 412 F.2d 289 (1st Cir. 1969). A major dispute "relates to the formation or modification of the collective agreement." *Carbone*, 645 F.2d at 98. A minor dispute "contemplates an existing agreement and relates 'to the meaning or proper application of a particular provision with reference to a specific situation or an omitted case.'" *Id.* (quoting *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945)).

Defendant contends that this dispute is minor because it is a question of whether the existing 1968 agreement applies to a particular new situation. Plaintiff contends that defendant has, in effect, unilaterally abrogated the agreement and the dispute is thus a major one. Plaintiff contends that by using an endpoint to the 204 mile route that is only 5 miles short of the original Concord endpoint, defendant is attempting to circumvent the 1968 agreement.

In fleshing out the test for determining whether a dispute is major or minor, the courts have looked to whether there is any basis in the existing contract for the action which gave rise to the dispute. If there is arguably some basis in the contract for the action, the dispute is arguably a question of interpretation or application of the contract and is thus minor. *REA Express, Inc. v. Brotherhood of Railway, Airline, Etc.*, 459 F.2d 226, 231 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972). The controversy is considered minor unless the claimed contract-based defense "is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by § 6 [45 U.S.C.

§ 156] for alteration of existing agreements." *Airline Stewards*, 412 F.2d at 291 (quoting *Southern Ry. v. Brotherhood of Locomotive Firemen*, 384 F.2d 323, 327 (D.C. Cir. 1967)).

In this case, the 1968 agreement provides that it is applicable "in the operation of special Unit Coal Trains between Mechanicville, New York and Concord, New Hampshire. . . ." It is true, as plaintiff contends, that the effect of the new lease agreement is that no Boston & Maine coal unit train employees will work on a Mechanicville to Concord route. Thus no such employees will be eligible for the pay and working conditions specified by the 1968 agreement. Plaintiff's argument that the contract has thus been effectively made inoperable is not without some logical force. Nonetheless, in light of the express language that the contract covers coal unit trains only between Mechanicville and Concord, I cannot conclude that defendant's claim that the agreement does not apply to coal unit trains running between Mechanicville and Bow is "insubstantial." There is at least an arguable basis for defendant's claim in the language of the agreement. I conclude therefore that this is a minor dispute, and that this court does not have jurisdiction to issue the preliminary injunction.

Because of the court's ruling on the jurisdictional issue, I need not decide the other issues raised by the parties in their submissions and at the hearing.

/s/ ROBERT E. KEETON
United States District Judge

APPENDIX D

Order of Dismissal Entered by District Court

(Dated October 4, 1985)

Civil Action No. 85-2882-K

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff,

v.

BOSTON & MAINE CORPORATION,
Defendant.

ORDER

For the reasons stated in the Memorandum of this date, it is ORDERED:

The case is dismissed for want of subject matter jurisdiction.

/s/ ROBERT E. KEETON
United States District Judge

APPENDIX E

Statutes Involved

Section 10505, Title 49, United States Code provides that:

Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the per-

son, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Section 11341, Title 49, United States Code provides that:

Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the

transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its powers under its corporate charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

Section 11347, Title 49, United States Code provides that:

Employee protective arrangements in transactions involving rail carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate

Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

Section 152, First, Title 45, United States Code provides that:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 152, Seventh, Title 45, United States Code provides that:

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its em-

ployees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Section 156, Title 45, United States Code provides that:

Procedure in changing rates of pay, rules and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.